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SUPREME COURT, U.S.

No. 07-891

In The
Supreme Court of the United States

NANCY ALEXANDER, *et al.*,
Petitioners,

v.

BOSCH AUTOMOTIVE SYSTEMS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permit a non-party to a duly negotiated and executed collective bargaining agreement to have the agreement rewritten by the trial court so as to require the payment of money damages to the Petitioners?

CORPORATE DISCLOSURE STATEMENT

The correct legal name of Respondent is Bosch Automotive Motor Systems, Inc. Respondent is a wholly owned subsidiary of Robert Bosch LLC, a Delaware limited liability company. Neither Respondent nor its parent is a publicly-traded company. No publicly-traded company owns 10% or more of Respondent's stock. Petitioners' statement in the "Parties to the Proceeding" section of Petitioners' petition for writ of certiorari (the "Petition") that Respondent is a publicly-traded corporation is incorrect.

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STATEMENT OF THE CASE

Petitioners' statement about the origins of the disputed plant-closing benefits (Petition at 3) is incorrect and misleading. The plant-closing benefits were not negotiated for the first time during the 1997 labor negotiations. The plant-closing benefits were in place when the plant was owned and operated by General Electric. Respondent inherited them when it bought the plant from GE. (Trial Tr. at 318-20.) What changed during the 1997 labor negotiations was Respondent's agreement with the UAW union[1] to define with precision when a "plant closing" would be deemed to have occurred. (*Id.* at 438-39; Trial Exh. No. 156.)

Petitioners' statement of the case amazingly omits any reference whatsoever to the collective bargaining agreement that Respondent and the UAW union negotiated during July 2000 (the "July 2000 CBA"). The omission is particularly startling since the July 2000 CBA is dispositive of all of Petitioners' claims. The disputed plant-closing benefits were a creation of the collective bargaining agreement. As such, the July 2000 CBA explicitly provided which bargaining unit employees would and which would not receive plant-closing benefits upon the closure of the plant in November 2000. (Trial Tr. at 417-29.) The schedules, which were a part of the July 2000 CBA, identified *by*

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[1] The bargaining unit employees, including Petitioners, were represented by a local union affiliated with the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

name the employees who were eligible (Schedule 1) and not eligible (Schedule 2) for the plant-closing benefits. (*Id.*) The July 2000 CBA expressly provided that the Petitioners – each of whom was listed by name on Schedule 2 – were not eligible for plant-closing benefits. (*Id.*)

The trial court, under the purported auspices of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3),[2] rewrote the July 2000 CBA by taking the Petitioners off Schedule 2 and placing them on Schedule 1. (Appendix, Vol. II to the Petition, at 36a-37a.) In this way, the trial court hoped to give the Petitioners money damages, a purely legal remedy, in avoidance of the limitations consistently imposed by this Court on the range of remedies available under 502(a)(3). The Sixth Circuit reversed, holding that the trial court was not free to revise or manipulate the July 2000 CBA and that the trial court's remedy was not "appropriate equitable relief" under 502(a)(3). *Alexander v. Bosch Automotive Systems, Inc.*, 232 Fed. Appx. 491, 40 Employee Benefits Cas. 2245, 2007 WL 1424299 (6th Cir. May 14, 2007), Appendix, Vol. II to the Petition, at 1a-25a.

INTRODUCTION

Petitioners ask this Court to revisit yet again the issue of what constitutes "appropriate equitable relief" under 502(a)(3). Petitioners, however, have done

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[2] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), is discussed extensively in this brief. To avoid the awkward duplication of the entire parallel citation every time the statute is cited, Respondent will refer simply to "502(a)(3)."

nothing more than repackage and disguise a claim for money damages in the hope of avoiding this Court's numerous rulings that such damages – the classic form of legal relief – cannot be recovered under 502(a)(3).

Even if Petitioners were able to articulate a claim for "appropriate equitable relief," which they cannot, Petitioners' claims would still be barred by the express terms and requirements of an intervening collective bargaining agreement. The Sixth Circuit properly recognized that the trial court was without authority to modify that collective bargaining agreement, which barred Petitioners' claims, whatever the outcome of their 502(a)(3) claim.

REASONS THE PETITION SHOULD BE DENIED

I. The Sixth Circuit's Opinion Is Not At Odds With *Varity*.

Petitioners attempt to create a conflict between the Sixth Circuit's opinion in this action and this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), by arguing that *Varity* held "that a reinstatement to benefits is appropriate relief under Section 502(a)(3)." (Petition at 11.)

Petitioners misrepresent *Varity*. The *Varity* Court did not conclude that reinstatement to benefits constituted "appropriate equitable relief" under 502(a)(3). The issue was never considered by the

Court because the appropriateness of the remedy had been conceded by the parties.[3]

The *Varity* Court considered only three questions: (1) whether, under the particular facts presented, the employer was acting in a fiduciary capacity; (2) whether the employer breached its fiduciary obligations; and (3) whether under 502(a)(3) plan beneficiaries could obtain individual relief (as opposed to relief to the plan as a whole, *see Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)). 516 U.S. at 492. Nowhere did the Court address whether the specific relief sought by the plaintiffs and ordered by the trial court was "appropriate equitable relief" under 502(a)(3).[4]

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[3] "Varity concedes that the plaintiffs satisfy most of [502(a)(3)]'s requirements, namely, that ... they are suing for 'equitable' relief to 'redress' a violation of ... a 'provision of this title.'" 516 U.S. at 508.

[4] Petitioners have doggedly misconstrued this Court's holding in *Varity* throughout these proceedings. Having noted that the *Varity* Court permitted a beneficiary to sue for individual relief under 502(a)(3), Petitioners leap to the unsubstantiated conclusion that *a fortiori* this Court must have approved the specific *type* of individual relief the plaintiffs could seek. The Court made no such leap in *Varity*.

II. This Case Is Inappropriate For Certiorari Because Numerous Insurmountable Obstacles Would Prevent This Court From Reaching The 502(a)(3) Issue.

The trial court revised the July 2000 CBA to require the payment of money damages to Petitioners. The trial court attempted to square this result with the limitations of 502(a)(3) by characterizing its remedy as a form of equitable reinstatement. In reality, what the trial court ordered was nothing less than a complete judicial abrogation of the July 2000 CBA between Respondent and the UAW union.

Petitioners argue that the instant "case provides an excellent alternative case for the Court to decide" the 502(a)(3) issue. (Petition at 17.) In fact, numerous defects in the trial court's logic and the Petitioners' claims will prevent this Court from ever reaching the 502(a)(3) issue presented by Petitioners.

A. The Sixth Circuit correctly found that the trial court mischaracterized its remedy.

The Sixth Circuit first scrutinized the trial court's characterization of its remedy as "equitable reinstatement." (Appendix, Vol. II to the Petition, at 12a.) Noting that "reinstatement" is considered an equitable remedy only in the context of unlawful employment termination and allows only reinstatement to employment, the Sixth Circuit noted further that reinstatement was not even a possibility in the instant case because the plant had already closed before Petitioners filed their complaint. (*Id.* at

12a-14a.) In any event, the trial court clearly did not reinstate the Petitioners to employment.

Rejecting the trial court's characterization of its remedy, the Sixth Circuit concluded that the trial court had really "instated," not reinstated, Petitioners. Because the Petitioners were never entitled to the disputed benefits, it was impossible to "reinstate" them to those benefits. (*Id.* at 14a.)

B. The Sixth Circuit correctly ruled that the equitable remedy of contractual reformation was inapplicable and unwarranted.

Having rejected the trial court's characterization of its remedy, the Sixth Circuit recognized that the trial court's remedy – rewriting the July 2000 CBA – was "more like the remedy of contractual reformation." (*Id.*) The appeals court recognized that reformation is only "available where the parties to a contract reached a valid agreement, but that mutually agreed-upon understanding was inadequately, mistakenly, or fraudulently conveyed in writing." (*Id.* at 15a-16a (citations omitted).) Neither Petitioners nor any other party has ever contended these circumstances were present in the instant case. (*Id.* at 16a-17a.)

The Sixth Circuit properly concluded that the July 2000 CBA accurately reflected the contracting parties' understanding and thus was not a proper candidate for the equitable remedy of reformation, since it is well-established that "reformation may not be used to foist upon the parties a contract they never made." (*Id.* at 17a (citations omitted).) The Sixth Circuit also

recognized that the trial court could not reform the July 2000 CBA for a second, equally compelling reason: except under very limited circumstances not present here, federal courts are without authority to abrogate or modify collective bargaining agreements duly negotiated within the framework of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* (*Id.* at 17a-19a.)

C. The Sixth Circuit correctly rejected characterizing the trial court's remedy as a form of equitable restitution.

The Sixth Circuit then examined whether any other type of appropriate equitable relief might be available, including equitable restitution. The appeals court found none and rejected equitable restitution as an available remedy based on this Court's teachings in *Great-West*[5] and *Sereboff*,[6] finding that at best Petitioners' claim could be characterized as legal, not equitable, restitution. (*Id.* at 19a-22a.)

D. Petitioners failed to exercise the viable remedy of reinstatement to employment.

Contrary to Petitioners' argument, the Sixth Circuit noted that Petitioners had a viable remedy

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[5] *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

[6] *Sereboff v. Mid Atlantic Med. Servs. Inc.*, 547 U.S. 356 (2006).

under 502(a)(3). (*Id.* at 24a.) They could have filed suit before the plant was closed, sought reinstatement of employment (recall to their former positions), and qualified for plant-closing benefits under the applicable collective bargaining agreement. By waiting to file suit until two months after the plant closed, notwithstanding adequate advance notice of what was to come, the Petitioners elected not to avail themselves of this available remedy. Thus, Petitioners' real complaint is not that they were completely without a remedy, but that, due solely to their own delay, they are now left without the money damages remedy they sought under 502(a)(3).

III. *Mathews v. Chevron* Is Not Applicable To The Instant Case And, Further, Does Not Constitute A Split Of The Circuits Requiring Intervention By This Court.

No more than a brief word about Petitioners' contentions regarding *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), is warranted. The Ninth Circuit in *Mathews* affirmed a 502(a)(3) remedy ordering the employer/fiduciary to amend certain plan records. Critical to the court's conclusion in *Mathews* was its recognition that the record amendment would not guarantee benefits. In contrast, the revisions to the July 2000 CBA ordered here guaranteed benefits and had the direct (and intended) consequence of awarding money damages to the Petitioners. Further, unlike *Mathews*, the trial court here rewrote a collective bargaining agreement in violation of applicable labor law separate and apart from ERISA. Thus, *Mathews* is not relevant to the Sixth Circuit's analysis here. It would be inappropriate to address

any alleged split in the circuits created by *Mathews* in a case to which *Mathews* is not applicable.

Even if *Mathews* were relevant here, which it is not, its anomalies are of insufficient magnitude to create a split in the circuits requiring intervention by this Court. According to Westlaw's KeyCite function as of the day of this writing, the remedy holding in *Mathews* has garnered four negative and no positive citing references. This lone opinion, generally disregarded by other circuits considering the issue, does not create a "circuit split." Even if it could be considered a "circuit split," the "split" is not mature enough, nor have competing ideologies been sufficiently fleshed out, to resolve it on the back of the instant case. Moreover, the Sixth Circuit's rejection of the reasoning in *Mathews* as unpersuasive was correct and hardly offers a compelling reason for granting the Petition in this case.

IV. This Court's Decision To Grant Certiorari In *LaRue* Is Not Relevant To, And Provides No Basis For Granting, The Instant Petition.

Citing this Court's decision to grant certiorari in *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 127 S. Ct. 2971 (2007), Petitioners argue that "[t]o the extent that the Court does not decide the Section 502(a)(3) issue presented in *LaRue*, this case provides an excellent alternative case for the Court to decide that issue." (Petition at 17.)

The focus of *LaRue* was an issue involving remedies under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). As

demonstrated during oral argument in *LaRue*, the case may also impact the scope of remedies under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The remedy issue under 502(a)(3) was at best a secondary issue thrown in as an afterthought.

The remedy issue under 502(a)(3) is well settled in this Court. The Court's granting certiorari in *LaRue* does not imply that the Court has any interest in revisiting the issue yet again.

Even if this Court were interested in revisiting the 502(a)(3) remedy issue, for the reasons outlined above, this case is not the appropriate vehicle for doing so.

CONCLUSION

The law applicable to this case is settled. Petitioners have not established any compelling reason for this Court to grant their Petition. Respondent prays that the Court deny the Petition.

Respectfully submitted,

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